

DOCKET FILE COPY ORIGINAL
BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

JAN 21 2000

In the Matter of)	
)	
Implementation of the)	CC Docket No. 96-115
Telecommunications Act of 1996)	
)	
Telecommunications Carriers' Use)	
of Customer Proprietary Network)	
Information and Other)	
Customer Information)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions of the Telecommunications Act)	
of 1996)	
)	
Provision of Directory Listing Information)	CC Docket No. 99-273
Under the Communications Act of 1934,)	
As Amended)	
)	

**REPLY OF THE ASSOCIATION OF DIRECTORY PUBLISHERS
TO OPPOSITIONS AND COMMENTS**

Philip L. Verveer
Theodore Whitehouse
Sophie J. Keefer

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384
Tel. (202) 328-8000

Its Attorneys

21 January 2000

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SUMMARY

The Association of Directory Publisher ("ADP") hereby replies to the Oppositions and Comments in this proceeding. Specifically, ADP requests that the Commission:

- (i) reject NTCA's proposal for a \$0.42 per listing presumptively reasonable benchmark rate for rural telephone companies;
- (ii) prohibit discrimination by ILECs among publishers in the provision of CLECs' SLI and delivery information for subscribers with unlisted or unpublished numbers;
- (iii) continue to require a carrier to make available the relevant portions of its contracts governing the provision of SLI to itself, its affiliates, or an entity that publishes directories on the carrier's behalf;
- (iv) reject commenters' suggestion that carriers be permitted to immediately cease providing SLI to a publisher if the carrier conjectures that the publisher is misusing the SLI;
- (v) continue to require carriers to provide the level of unbundling requested by a publisher if their internal systems can accommodate the request; and
- (vi) adopted certain procedural safeguards, such as modification of the time period for carriers to inform a publisher that the carrier cannot comply with a request for SLI from thirty to seven days.

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**REPLY OF THE ASSOCIATION OF DIRECTORY PUBLISHERS
TO OPPOSITIONS AND COMMENTS**

The Association of Directory Publishers ("ADP"), by its attorneys, hereby replies to the Oppositions and Comments in the above captioned proceeding.¹

I. THE FCC SHOULD REJECT COMMENTERS' PROPOSALS FOR A MARKET-BASED BENCHMARK RATE FOR RURAL TELCOS.

ADP replies to the Comments of CenturyTel, TDS Telecom, the National Rural Telecom Association ("NRTA"), the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO"), and the Yellow Pages Publishers

¹ See In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of CPNI and Other Customer Information, CC Docket No. 96-115, Third Report and Order, FCC 99-227 (rel. Sept. 9, 1999)("Third Report and Order").

Association ("YPPA"), which were filed in support the Petition of the National Telephone Cooperative Association ("NTCA") requesting that the FCC adopt \$0.42 per listing as a presumptively reasonable rate for both basefile and updated SLI for rural telephone companies.² NTCA admits that only 107 of its 517 members "have provided NTCA with subscriber list rates based on market-value which yield an average rate of \$0.42 per subscriber listing."³ NTCA's proposal is inherently flawed, due to its predication on "market" based rates.⁴ In this context, of course, "market" is a euphemism for the price obtainable through the full exercise of the LECs' monopoly power. Section 222(e) was adopted precisely to curtail the exercise of that monopoly power.⁵

NTCA's proposal further fails at logic. NTCA, and commenters NRTA and OPASTCO, assert repeatedly that no telco should be forced to sell SLI at an on-going loss. It is therefore reasonable to assume that the per listing rate proposed by NTCA would allow the least efficient among its membership to recover its incremental costs and provide a reasonable contribution to common costs and overhead. Therefore, if adopted, the proposal would permit up to 106 NTCA members who responded to its survey, and an inestimable number of its other 410 members who did not, to derive compensation in

² See CenturyTel and TDS Telecom Comments, at 5; NRTA and OPASTCO Comments, at 6; YPPA Comments, at 10-11.

³ NTCA Petition, at 7. It is unclear from NTCA's Petition whether 107 or 106 members responded with market-based rates. See id. at 3.

⁴ Id.

⁵ YPPA continues to assert that "value must also be a factor" in establishing rates for SLI. YPPA Comments, at 11. YPPA's assertion amounts to an untimely petition for reconsideration and should be disregarded by the FCC.

excess of their costs in direct violation of the Third Report and Order and Congress' intent in enacting section 222(e) to redress a market failure in the directory publishing market.⁶

ADP acknowledges that some rural telcos' costs may exceed the presumptively reasonable benchmark rates established by the FCC; however rural telcos' rates must be based on cost. Rural telcos may not charge whatever they want for SLI simply because they do not wish to perform a cost study. NTCA notes that that its members and directory publishers "amicably negotiated" rates for decades.⁷ The facts are that during that time period, publishers had no choice but to pay the "whatever-the-market-will-bear" rates extracted by the telcos. Now that rules established in the Order have introduced equity to the negotiation process, the telcos blame the FCC for disrupting "this cordial and cooperative environment between rural telephone companies and directory publishers."⁸ If the environment is purportedly changing, it is not because of the FCC's action; rather, it is because the rural telcos are resisting or refusing to meet their obligation to provide SLI at cost-based rates. Independent directory publishers, in fact, prefer to continue to negotiate rates as cordially and cooperatively as ever, rather than through the filing of complaints and resultant cost studies, providing the negotiations are predicated on cost. Accordingly, the FCC should reject NTCA's proposal.

CenturyTel and TDS Telecom also incorrectly assert that directory publishers are not entitled to refunds for excessive rates collected by carriers for SLI prior to the release

⁶ Third Report and Order, at ¶ 92.

⁷ NRTC Petition, at 4.

⁸ Id.

of the Third Report and Order.⁹ However, Section 222(e) took effect upon its enactment in February 1996.¹⁰ Therefore, publishers are entitled to a refund for excessive rates charged by carriers since the effective date of Section 222(e).

II. ILECS MAY NOT DISCRIMINATE AMONG PUBLISHERS IN THE PROVISION OF CLECS' SLI AND DELIVERY INFORMATION FOR SUBSCRIBERS WITH UNLISTED OR UNPUBLISHED NUMBERS.

While the three largest CLEC trade associations -- ALTS, CompTel, and TRA -- support ADP's position concerning ILEC provision of CLECs' SLI to independent publishers when the ILEC provides these data to its own directory publishing affiliate,¹¹ predictably, the ILECs and YPPA oppose it.¹² Similarly, some commenters oppose ADP's position with respect to delivery information for subscribers with unlisted or unpublished numbers.¹³ However, these commenters fundamentally misunderstand ADP's position. ADP is not requesting that ILECs volunteer to act as "clearinghouses" for SLI or that the FCC create a "*per se* rule" with respect to unlisted or unpublished data.¹⁴ Rather, ADP is simply asking the FCC to level the playing field and eliminate the unfair and discriminatory

⁹ CenturyTel and TDS Telecom Comments, at 6.

¹⁰ See In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of CPNI and Other Customer Information, 13 FCC Rcd. 8061, at ¶ 10 (1998).

¹¹ See generally ALTS and CompTel Comments; TRA Comments.

¹² See Bell Atlantic Opposition, at 2-3; BellSouth Opposition, at 6-8; GTE Opposition, at 5-7; US WEST Opposition, at 7-8; YPPA Opposition, at 3-5.

¹³ See Bell Atlantic Opposition, at 1-2; BellSouth Opposition, at 4-6; YPPA Opposition, at 2-3.

¹⁴ US WEST Comments, at 7; BellSouth Comments, at 5.

competitive advantages held by the ILECs' directory publishing affiliates due solely to their common ownership with the ILECs.¹⁵

While it is encouraging to hear that many ILECs will now provide CLECs' SLI, as well as delivery information for unlisted and unpublished subscribers, to independent publishers,¹⁶ the reality is that independent publishers are not in the same position as the ILECs' directory publishing affiliates and therefore do not receive the same benefits. Bell Atlantic, GTE, and US WEST claim that these issues are beyond the scope of this proceeding because the statutory bases are sections 201 and 202 of the Act, not section 222(e).¹⁷ However, without access to all the listings that are available to the ILECs' affiliates (including CLECs' listings), independent publishers cannot effectively compete with these entities, and directory advertisers and users are denied the full benefits of the competition that Congress intended to encourage through section 222(e). Similarly, independent publishers must have the ability to deliver their directories to all subscribers in a region, including those with unlisted or unpublished numbers, in order for competition to be full and effective.¹⁸

¹⁵ See ADP Petition, at 4 & 8-19 (describing the competitive advantages possessed by the ILECs' directory publishing affiliates); TRA Comments, at 6 ("For every advantage conferred by an incumbent LEC's practice of providing competitive LEC SLI only to its own publishing affiliate, the incumbent LEC imposes a corresponding disadvantage upon some other party.").

¹⁶ See BellSouth Opposition, at 5 & 6-7.

¹⁷ Bell Atlantic Opposition, at 2; GTE Opposition, at 6; US WEST Opposition, at 7.

¹⁸ "Nearly a third of Bell Atlantic's telephone customers in the District, a quarter of those in Maryland and one in five in Virginia" are unlisted or unpublished. Robert O'Harrow, Jr., "A Hidden Toll on Free Calls: Lost Privacy; Not Even Unlisted Numbers Protected From Marketers," Wash. Post, at A01 (Dec. 19, 1999).

III. CARRIERS MUST MAKE AVAILABLE TO PUBLISHERS RELEVANT PORTIONS OF THEIR CONTRACTS GOVERNING THE PROVISION OF SLI.

A carrier is required to make available to requesting directory publishers contracts the carrier has executed governing the provision of SLI to itself, an affiliate, or an entity that publishes directories on the carrier's behalf.¹⁹ By allowing independent publishers access to a carrier's contracts with publishers with whom the carrier is affiliated or is involved in a business undertaking, the carrier will be deterred from discriminating against independent publishers. Commenters' suggestions that a publisher first petition the FCC for access to contracts -- subject to *in camera* review by FCC staff and/or a protective order -- would squander administrative resources that would be better used to resolve disputes between parties concerning SLI.²⁰ However, ADP agrees with these commenters that to the extent that portions of the agreements may not be related to provision of SLI, these portions would not need to be disclosed.

¹⁹ Third Report and Order, at ¶ 58.

²⁰ See BellSouth Opposition, at 15; GTE Opposition, at 10-12; YPPA Opposition, at 8-9. YPPA claims that the FCC must reconsider this rule because it was not specifically discussed in the Notice in this proceeding. YPPA Opposition, at 8. However, the Notice specifically requested comment on "what regulations or procedures may be necessary" to implement section 222(e) and what safeguards would be needed "to ensure that a person seeking subscriber list information is doing so for the specified purpose of 'publishing directories in any format.'" In re Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of CPNI and Other Customer Information, 11 FCC Rcd. 12513, at ¶¶ 45 & 46 (1996). Therefore, this rule, which regulates the means by which carriers can limit access by publishers to SLI, is a "logical outgrowth" of the Notice. See In re Amendment of Parts 21 and 74 to Enable MDS and ITFS Licensees to Engage in Fixed Two-Way Transmissions, 13 FCC Rcd. 19112, at ¶ 62 (1998).

IV. A CARRIER MAY NOT CEASE PROVIDING SLI TO PUBLISHERS SIMPLY BECAUSE THE CARRIER CONJECTURES THE PUBLISHER MAY BE MISUSING THE SLI.

Commenters insist that carriers must be permitted to cease providing SLI to publishers if they surmise a publisher is misusing the SLI.²¹ This draconian approach to suspected misuse of SLI by carriers -- termination of all rights to obtain SLI -- would have far-reaching anticompetitive effects. Specifically, carriers could utilize this "guilty until proven innocent" approach to potential misuse of SLI to put a competing directory publisher out of business. Moreover, these commenters' concerns are purely speculative as they provide no evidence of actual misuse of SLI by independent publishers.

V. CARRIERS MUST PROVIDE THE LEVEL OF UNBUNDLING REQUESTED BY A PUBLISHER IF IT CAN BE ACCOMMODATED BY THEIR INTERNAL SYSTEMS.

Carriers must provide the level of unbundling requested by a publisher if their internal systems can accommodate it.²² This remains true even if some additional programming is required. At a minimum, is it reasonable to expect that carriers' internal systems will accommodate requests for SLI unbundled by geographic area, such as by NXX or zip code. However, if a carrier's systems cannot accommodate the level of unbundling requested by a publisher, the carrier may only charge the publisher for those listings that the publisher actually uses.²³ Several commenters assert that publishers must pay for all listings they acquire if the carrier is unable to provide the level of unbundling requested.²⁴ ADP disagrees; if the publisher's request for unbundling is reasonable, yet the

²¹ BellSouth Opposition, at 14; US WEST Opposition, at 4; YPPA Opposition, at 9.

²² Third Report and Order, at ¶ 66.

²³ Id.

²⁴ BellSouth Comments, at 13; US WEST Comments, at 5.

carrier's internal system cannot accommodate it, the publisher is not required to pay for the additional listings. ADP also wishes to make clear that carriers may be called upon to perform additional programming that does not amount to modification of their internal systems in order to comply with a publisher's request for unbundled data. Moreover, carriers may not intentionally "downgrade" the quality of the SLI provided to independent publishers under the FCC's presumptively reasonable benchmark rates.²⁵

VI. CERTAIN PROCEDURAL SAFEGUARDS ARE APPROPRIATE TO ENSURE COMPETITION IN THE DIRECTORY PUBLISHING MARKET.

In its Petition, ADP suggested several procedural mechanisms to ensure that publishers receive SLI under reasonable and nondiscriminatory rates, terms, and conditions and on a timely and unbundled basis. These mechanisms include: (1) modification of the current time limit for LECs to inform independent directory publishers that they cannot comply with a request for SLI; (2) accelerated treatment of SLI rate complaints; and (3) the routine grant of interim relief. Several commenters opposed these suggestions as being unwarranted, unprecedented, or unduly favorable to publishers.²⁶ ADP continues to believe that the relief requested is necessary to promote competition in the directory publishing market.

For example, several commenters opposed ADP's request that the FCC reduce to seven days the period within which LECs must inform independent publishers that they

²⁵ For example, a few carriers have suggested absurd distinctions between "basic" and "enhanced" SLI, presumably in order to avoid application of the benchmarks, stating that the "enhanced" SLI will be sold at higher rates. See, e.g., US WEST Opposition, at 8 (stating that alphabetized SLI will be considered an "enhanced" product).

²⁶ See, e.g., Bell Atlantic Opposition, at 3; BellSouth Opposition, at 9-11.

cannot comply with a request for SLI.²⁷ To clarify, ADP is concerned that the FCC's rules, as written, will result in unintended consequences. The Third Report and Order requires listings to be ordered at least thirty days in advance.²⁸ The Order also permits a carrier to wait thirty days following a request for listings to inform a publisher that the format requested is not available and to offer alternative formats.²⁹ Thus, a publisher may receive notice that the LEC can not meet its request for listings on the thirtieth day following the initial request, *i.e.*, the day the publisher expected to receive the listings. Consequently, modification of the rules is required.³⁰

Commenters also oppose ADP's request for interim relief during the pendency of an SLI rate complaint and a guarantee that such complaints will be resolved expeditiously.³¹ ADP notes that the FCC has on other occasions promulgated special complaint procedures -- including timelines for resolution of such complaints -- where necessary to promote competition.³²

²⁷ Bell Atlantic Opposition, at 3; GTE Opposition, at 8; US WEST Opposition, at 6.

²⁸ Third Report and Order, at ¶ 62.

²⁹ Id. at ¶ 66.

³⁰ A possible solution would be to hold carriers to the thirty day timeframe, regardless of whether the publisher must chose an alternative format.

³¹ See, e.g., BellSouth Opposition, at 6; US WEST Opposition, at 8. But see YPPA Opposition, at 7-8 (supporting expedited resolution of SLI complaints).

³² See Pole Attachment Complaint Procedures, 47 C.F.R. § 1.1401 *et. seq.* BellSouth also requests clarification that ILECs' directory publishing affiliates are not subject to section 222(e). BellSouth Opposition, at 8. However, BellSouth does not dispute the well-established principle that carriers may not use their unregulated affiliates in order to avoid their statutory duties.

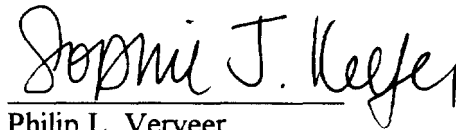
VII. CONCLUSION.

ADP respectfully urges the FCC to take the actions outlined herein and in its Petition for Reconsideration and Opposition to Petitions for Reconsideration in this proceeding.

Respectfully submitted,

**THE ASSOCIATION OF
DIRECTORY PUBLISHERS**

By:



Philip L. Verveer
Theodore Whitehouse
Sophie J. Keefer

WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036-3384
Tel. (202) 328-8000

Its Attorneys

21 January 2000

CERTIFICATE OF SERVICE

I, Sophie J. Keefer, do hereby certify that on this 21st day of January, 2000, copies of the foregoing Replies to Oppositions of the Association of Directory Publishers were served via First Class U.S. Mail, postage prepaid (unless otherwise indicated), to the following parties:

The Honorable William E. Kennard*
Chairman
Federal Communications Commission
Rm. 8-B201
445 12th Street, SW
Washington, DC 20554

The Honorable Michael K. Powell*
Federal Communications Commission
445 12th Street, SW
Rm. 8-A204
Washington, DC 20554

The Honorable Susan Ness*
Federal Communications Commission
Rm. 8-B115
445 12th Street, SW
Washington, DC 20554

The Honorable Gloria Tristani*
Federal Communications Commission
Rm. 8-C302
445 12th Street, SW
Washington, DC 20554

The Honorable Harold Furchtgott-Roth*
Federal Communications Commission
Rm. 8-A302
445 12th Street, S.W.
Washington, DC 20554

Al McCloud*
Common Carrier Bureau
Network Service Division
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

William A. Kehoe, III*
Common Carrier Bureau
Federal Communications Commission
Rm. 5-C312
445 12th Street, S.W.
Washington, DC 20554

Lawrence E. Strickling, Chief*
Common Carrier Bureau
Federal Communications Commission
Rm. 5-C345
445 12th Street, S.W.
Washington, DC 20554

Daniel R. Shiman*
Common Carrier Bureau
Federal Communications Commission
Rm. 5-B155
445 12th Street, S.W.
Washington, DC 20554

John M. Goodman
Bell Atlantic
1300 I Street, N.W.
Washington, D.C. 20005

Kathryn Marie Krause
US WEST COMMUNICATIONS, INC.
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036

L. Marie Guillory
Daniel Mitchell
National Telephone Cooperative Association
4121 Wilson Boulevard
10th Floor
Arlington, VA 22203

Glenn S. Rabin
Assistant Vice President
Federal Regulatory Affairs
ALLTEL Services Corporation
601 Pennsylvania Avenue, N.W.
Suite 720
Washington, D.C. 20004

Jonathan M. Askin
ALTS
888 17th Street, N.W.
Suite 900
Washington, D.C. 20006-3307

Robert M. McDowell
CompTel
1900 M Street, N.W.
Suite 800
Washington, D.C. 20036-3509

ITS, Inc.
1320 20th Street, N.W.
Washington, D.C. 20036

Charles C. Hunter
Hunter Communications Law Group, P.C.
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
(counsel to TRA)

Ernest B. Kelly
TRA
1730 K Street, N.W.
Suite 1201
Washington, D.C. 20006-3868


Sophie J. Keefer

*Via hand delivery.